

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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DEC 10 2002

In the Matter of)

Amendment of Section 73.202(b))

Table of Allotments)

FM Broadcast Stations
 (Ainboy, California))

MB Docket No. 02-124

RM-10446

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

To: Assistant Chief, Audio Division
 Media Bureau

REPLY TO OPPOSITION

Marathon Media Group, L.L.C. ("Marathon"), licensee of Station KHUL(FM) (formerly KONY-FM), Kanab, Utah, by its counsel, hereby replies to the Opposition of Cameron Broadcasters Inc. ("Cameron") to a Motion to Dismiss its Counterproposal filed by Infinity Radio Operations, Inc. ("Infinity.") in the above-captioned proceeding.¹ Infinity had raised two issues which, *it* argued, required dismissal of Cameron's counterproposal. First, Infinity argued that Cameron's counterproposal was defective in failing to protect Marathon's previously filed proposal in MM Docket No. 01-135 (Caliente, Nevada). Second, Infinity argued that Cameron's counterproposal was defective for failure to include the express written consent of one of the affected licensees affected thereby (KJUL License, LLC, licensee of Station KSTJ, Boulder City, Nevada). Since Cameron's opposition concerning the first of these arguments challenges the acceptability of Marathon's proposal in the Caliente proceeding, Marathon offers these reply comments. In support hereof,

¹ The Motion to Dismiss was filed on November 6, 2002, and the Opposition was filed on November 20, 2002, the last day for oppositions pursuant to Section 1.45 and 1.4(b) of the Commission's Rules. Ordinarily, this Reply would have been due on December 3, 2002. However, on November 26, 2002, Infinity and Cameron filed a timely Consent Motion for Extension of Time requesting an additional week to file a reply, until December 10, 2002. That motion for extension of time has not been formally acted upon, and this reply is therefore timely.

Marathon states as follows:

1. In its Opposition, Cameron argued that if its counterproposal were defective, then the same was true of Marathon's proposal in the Caliente proceeding. At first blush, this argument appears to fall under the rubric of cutting off one's nose to spite one's face. The Commission's rules require a rule making proponent to protect a previously filed and cut off proposal. *See Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990). This is true whether or not the previously filed proposal is found to have been defective and subsequently dismissed. *Mason, Menard and Fredericksburg, Texas*, 15 FCC Rcd 12618 (2000). If this rule is strictly and unthinkingly applied, it would have required the dismissal of Marathon's proposal in the Caliente proceeding as well as the dismissal of Cameron's proposal in this one.

2. Fortunately, the Commission does not apply its rules strictly and unthinkingly, and there are reasons in favor of a more tempered approach in this case. Cameron's better argument appears in a footnote in its pleading. Because of a revision to Marathon's counterproposal in the Caliente proceeding – which Cameron supported – the conflict between Cameron's proposal and Marathon's has been eliminated without prejudice to any other proposal pending before the Commission. *See* Opposition at 1-2 n.1. Accordingly, the proper response to Infinity's argument is that any conflict which may have existed with respect to Cameron's counterproposal no longer exists.

3. The Commission should interpret Cameron's opposition as a request that Marathon's and Cameron's global solution be adopted and implemented, because in that way Cameron's counterproposal can continue to be processed. The Commission has a policy to favor conflict resolutions through the use of alternate channels and transmitter sites. because in this manner service improvements can be rapidly realized with accompanying benefits to the public. In *Stamps and Fouke, Arkansas*, 15 FCC Rcd 13297 (2000), the Commission granted a formerly defective proposal

on the ground that an alternate transmitter site had been suggested in the proceeding with which it was in conflict, even though the alternate transmitter site modified a counterproposal in that proceeding. *See also Bristol Vermont*, 15 FCC Rcd 18917 (2000) (Channel 248A allotted to Bristol despite having initially been in conflict with another proceeding). An alternate channel can be accepted in the Caliente proceeding as a routine matter since no other proposal would be prejudiced thereby. *See, e.g., Roxton, Texas and Soper, Oklahoma*, 13 FCC Rcd 20992 (1998); *Walla Walla and Pullman, Washington, and Hermiston, Oregon*, 13 FCC Rcd 13342 (1998). The Commission should not interpret Cameron's opposition as a suicidal argument for the strict application of the rule against contingent rule making proposals, because it would be irrational for a party to argue against its own interests.

4. Moreover, to the extent that Cameron's opposition is taken as an argument that Marathon's Caliente proposal should be dismissed, Cameron is wrong. Although the Caliente proposal included a proposed allotment that was short spaced to a then-pending proposal in MM Docker 01-69 (Parker, Arizona), that proposal was subsequently dismissed, removing the conflict, and no purpose would be served by dismissing Marathon's now-perfected proposal. Marathon, unlike Cameron in this case, had included in its counterproposal an alternate channel for use by the petitioner, thus removing any conflict from the Caliente proceeding. No other conflicting counterproposals were filed. Therefore, the usual policy regarding strict compliance for counterproposals is relaxed, because any subsequent amendments or changes do not prejudice other timely filed proposals. *See Boalsburg, Pennsylvania, et al.*, 7 FCC Rcd 7653, 7654 n.7 (1992) (minor curative amendments to counterproposals not absolutely prohibited); *cf. Detroit, Texas, et al.*, 13 FCC Rcd 15591 (1998) (acceptance of late-filed cure would have prejudiced a mutually exclusive proposal in the proceeding)

5. In addition, Cameron's allegation that Marathon and its counsel filed its

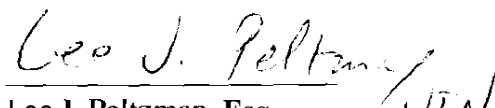
counterproposal in the **Caliente** proceeding with the knowledge that it **conflicted** with **Parker, Arizona** is also wrong. Neither Marathon nor its counsel **knew** of the conflict at the time Marathon filed its counterproposal, **because** the proposal with which it was in conflict, Channel 234C0 at Searchlight, Nevada, had not **been** entered into the **Commission's** engineering data base and therefore did not appear in Marathon's channel studies. Although Marathon's counsel had filed **comments** in the Parker, Arizona proceeding on **behalf** of another client, that filing did not give **Marathon** or its counsel knowledge of any conflict in Marathon's proposal three months later. Marathon, like other parties, relies on its contemporaneously conducted channel studies, Cameron's assumptions to the contrary notwithstanding

WHEREFORE, for the foregoing **reasons**, the Commission should adopt Marathon's and Carneron's joint **resolution** removing any conflict between this **proceeding** and **MM Docket No. 01-135** and process the proposals in this proceeding expeditiously

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Shook, Hardy and Bacon, do hereby certify that I have on this 10th day of December, caused to be mailed by first class mail, postage prepaid, copies of the foregoing **“Reply to Opposition”** to the following:

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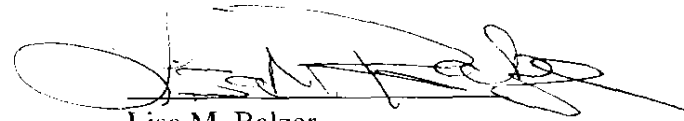
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